OFFICE-SUPREME COURT, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 401

JOHN WALDON,

Petitioner,

vs.

EDWIN B. SWOPE, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN WALDON,
In Propria Persona.

INDEX

Subject Index

Page

Petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit 1
Statement 3
Note 12
Questions presented 12
Reasons relied on for the allowance of the writ 13
Prayer for writ 15
Brief in support of petition for writ of certiorari 17
Opinions below 17
Jurisdiction 7
Statement of the case 18
Specification of errors 18
Summary of argument 19
Argument:
1. A definite term of imprisonment and a $20,000 fine were imposed on petitioner, where the statutory penalty provided for imprisonment only. $833.50 of the illegally imposed fine was collected by distraint of personal property and covered into the United States Treasury. Several years later in the absence of petitioner and without notice to him, the Court vacated the illegally imposed fines without any reference to the money, which the Government still retains. In these circumstances, the complete defect of such punishment, an invasion of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause, and the double jeopardy provision of the Fifth Amendment 21
2. Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to di-

Page

rect the administration of justice in the Federal Courts, it was error rendering invalid the judgment of conviction, for the Court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after timely objection was made 34

3. The admitted error in sentencing petitioner to consecutive terms of imprisonment for the same offense, put petitioner twice in jeopardy, contrary to the Fifth Amendment 46

Conclusion 50

Table of Authorities Cited

Cases:

Alger v. *United States*, 171 F. 2d 667 40
Arthur L. Bell et al. v. *United States*, 159 F. 2d 247 (C.A. 9) 39
Ballard v. *United States*, 329 U. S. 187 ..... 14, 35
Ballard v. *United States*, 152 F. 2d 941 (C.A. 9) 42
Bozza v. *United States*, 330 U. S. 160 .....
Brown v. *United States*, 165 F. 2d 409 40
Colsen v. *Johnston*, 35 F. Supp. 317 (D. C. Cal.) 49
Costner v. *United States*, 139 F. 2d 429 ..... 20, 49
Dean v. *United States*, 169 F. 2d 71 (C.A. 9) 40
DeBenque v. *United States*, 85 F. 2d 202 32
Dimenza v. *Johnston*, 130 F. 2d 465; rehearing denied 131 F. 2d 47 (C.A. 9) 49
Downey v. *United States*, 67 App. D. C. 192, 91 F. 2d 223 30
Ex parte Lagomarsino, 13 F. Supp. 947 (D. C. Cal.) 47
Ex parte Lange, 85 U. S. 163 ..... 14, 22
Ex parte Parks, 93 U. S. 18 28
Glasser v. *United States*, 315 U. S. 60 ..... 37, 42
Hogan v. *Hill*, 9 Fed. Supp. 333 30
Hopt v. *Utah*, 110 U. S. 574 29
Hunter v. *United States*, 149 F. 2d 711 ..... 20, 49
In re Bonner, 157 U. S. 242 33

Page

In re Bradley, 318 U. S. 50 30
In re Mills, 135 U. S. 263 32
In re Nielson, 131 U. S. 176 33
In re Swan, 150 U. S. 637 28
Johnston v. *Lagomarsino*, 88 F. 2d 86 (C.A. 9) 47
King v. *United States*, 165 F. 2d 408 40
Kerr v. *Squier*, 151 F. 2d 308 (C.A. 9) 47, 49
Murphy v. *Massachusetts*, 177 U. S. 155 33
People v. *Eller*, 153 N. E. 597 31
Price v. *Zerbst*, 268 F. 2d 72 29
Redman v. *Squier*, 162 F. 2d 195 (C.A. 9) 41
Reynolds v. *United States*, 98 U. S. 145 ..... 33, 35
Rogers v. *Squier*, 174 F. 2d 348 (C.A. 9) 41
Schwartz v. *United States*, 160 F. 2d 718 (C.A. 9) 49
Sibbach v. *Wilson Co.*, 312 U. S. 1 35
Thiel v. *Southern Pacific Company*, 66 S. Ct. 984 38
United States v. *Bozza*, 155 F. 2d 592 33
United States v. *Dressler*, 112 F. 2d 972 45
United States v. *Glasser*, 116 F. 2d 690 43
United States v. *Myers*, 84 F. Supp. 766 39
United States v. *Pridgeon*, 153 U. S. 48 27
United States v. *Roemig*, 52 F. Supp. 857 ..... 37, 46
Waldon v. *United States*, 84 F. Supp. 449 ..... 10, 47
Waldon v. *United States*, 114 F. 2d 982 ..... 2, 6
Waldon v. *United States*, 312 U. S. 641 .....
Williams v. *United States*, 168 F. 2d 866 40
Windsor v. *McVeigh*, 93 U. S. 274 30
Wright v. *United States*, 165 F. 2d 405 40
York v. *United States*, 167 F. 2d 847 40
Zap v. *United States*, 330 U. S. 800 .....

STATUTES

Constitution of the United States:
Fifth Amendment 8, 13, 14, 18, 19, 27, 34
Sixth Amendment 8, 13, 14, 18
Criminal Code, Section 194 (U.S.C. Title 18, Sec. 317) 4, 46
Criminal Code, Section 197 (U.S.C. Title 18, Sec. 320) 4, 5, 21, 48
Illinois Revised Statutes, 1939, C. 78, Secs. 1, 25 ..... 20, 36

Page

Illinois Constitution, Article IV, Section 12 36
Judicial Code, Sec. 275 (U.S.C. Title 28, Sec. 411) .. 20, 36
Title 18 U.S.C. Secs. 710, 713 744h 11
Title 28 U.S.C. Sec. 1254 (1) 15, 17
Title 28 U.S.C. Sec. 411 ..... 20, 36
Title 28 U.S.C.A. Sec. 2255 7

TEXTBOOK

39 Corpus Juris Secundum, Habeas Corpus, Sec. 26, page 499 29

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 401

JOHN WALDON,

Petitioner,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, John Waldon, respectfully presents to this Court his petition and prays that a writ of certiorari issue under the authority of Title 28 U.S.C. Sec., 1254 (1) (Judicial Code and Judiciary) to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered and entered September 15, 1950 (R. 77) affirming the judgment of the United States District Court for the Northern District of California, denying petitioner's application for a writ of habeas corpus.

The District Court for the Northern District of California did not deliver an opinion. The order filed November

23, 1949, is printed at R. 63. The opinion of the Appellate Court rendered and filed September 15, 1950, consists of only one short paragraph of four lines.

Which in a *per curiam* opinion, did no more than say:

> "This appeal is from an order denying a petition for a writ of habeas corpus. The order is affirmed. See United States *v.* Waldon, 7 Cir., 114 F. 2d 982; Waldon *v.* United States, 312 U.S. 681; Id. 324 U.S. 847, 889; Id. D. C. E. D. Ill., 84 F. Supp. 449."

On each of the two occasions cited in the four line opinion *supra*, when certiorari was petitioned for before this Court, the important questions herein involved were not presented. On one of said occasions the pleadings were not properly framed and the petition could not legally be entertained. In fact the Solicitor General in his Memorandum in opposition stated that the Court of Appeals for the Seventh Circuit had no authority to hear the motion. However the said Court of Appeals consisting of but two Judges in a *per curiam* opinion denied the motion on the merits. This Court denied certiorari. These are the two certiorari citations, which are now stated as authority in the instant case.

It may be noted that Mr. Justice Minton was not then a member of the Court of Appeals, Seventh Circuit, and when a member, did on many occasions, in strong dissents, condemn the invoking of the harmless theory doctrine, where substantial prejudice was shown.

In the present proceedings, neither the Trial Judge in the Eastern District of Illinois, nor the District Court in the Northern District of California, Southern Division, and not even the Court of Appeals below did ever by so much as one very small word, mention the $833.50 distrained portion of the fines, illegally imposed and unlawfully retained.

Significantly, not even the Government Counsel, has ever claimed that petitioner is not suffering substantial prejudice

and has carefully refrained from any discussion of the $833.50.

Where in this unfortunate record is the proud tradition of the lower Federal Courts?

Petitioner, a layman, dependent solely on his earnings in the prison industries, the past ten years, cannot afford the space required for the argument, which the importance of the questions merit.

He does hope that such earnings have enabled him to properly present for the first time, an adequate petition to this Court for decision.

Money, even as the knowledge of law, comes the hard way in a penitentiary.

Statement

On September 6, 1939, petitioner and two others were indicted in the District Court of the United States for the Eastern District of Illinois in seven counts charging offenses against the postal service (R. 25). As indicated by the indictment, the charges grew out of an alleged attempt by petitioner and two others to rob a United States mail car. The first three counts (R. 25) charged the defendants with destroying certain mail matter, in violation of Section 194 of the Criminal Code (18 U.S.C. 317); the fourth count alleged an assault with intent to rob mail clerk Guy O'Hern of the mail; the fifth count alleged an assault with intent to rob mail clerk Carl C. Boothman of the mail; the sixth count alleged an assault with intent to rob the said mail clerk O'Hern, and in attempting to effect such robbery did wound said mail clerk by the use of a dangerous weapon; the seventh count alleged an assault with intent to rob the said mail clerk Boothman, and in attempting to effect such robbery, did jeopardize the life of said mail clerk by the use of a dangerous weapon. Counts 4, 5, 6 and 7

were in violation of Section 197 of the Criminal Code (18 U.S.C. 320) (R. 30).

Section 194 of the Criminal Code, Title 18 U.S.C.A. Section 317 as in effect on September 6, 1939, provides in pertinent part:

> "* * * whoever shall take any letter, postal card or package out of any post office or station thereof, or out of any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or station thereof, or other authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall open, secrete, embezzle, or destroy the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Section 197 of the Criminal Code, Title 18 U.S.C.A., Section 320; Provides:

> "Whoever shall assault any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money or other property of the United States, or any part thereof, or shall rob any person of such mail matter, or of any money, or other property of the United States, or any part thereof, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, money, or other property of the United States, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

From the filing of the indictment through to the denial of the motion in arrest of judgment, the defendant ques-

tioned at every opportunity the sufficiency of the evidence. (R. 16).

At the commencement of the trial defendant challenged the petit jury, on the ground that women had been improperly excluded from the jury panel. (R. 15). The challenge was overruled and thereafter such ruling was assigned as error.

Petitioner's two codefendants, on pleas of guilty were each sentenced to twenty-five (25) years imprisonment.

A trial was had as to petitioner and the jury returned a verdict of guilty on all counts. Petitioner was sentenced to imprisonment for the period of:

Five years from this date on each of Counts 1, 2, 3, 4 and 5—said sentences to run and be served consecutively with each other.

Twenty-five (25) years and ten thousand ($10,000.00) dollar fine on the 7th count of said indictment—sentence on Counts 6 and 7 to run consecutively with each other but concurrently with sentence imposed on Counts 1, 2, 3, 4 and 5 of said indictment, and that said defendant stand committed to said Institution until payment of said fine, or until said defendant is otherwise discharged as provided by law. (R. 37).

No fine is provided for by Section 197 of the Criminal Code (18 U.S.C. 320).

On appeal to the Circuit Court of Appeals for the Seventh Circuit the judgment of the District Court was affirmed. Counsel for appellant assigned five errors, upon which reversal was sought. Only one of these assignments, however, was urged at the hearing before the Circuit Court of Appeals, because Counsel stated in his opening brief:

"The sole error relied on arises out of the admission of highly prejudicial evidence at the trial, over the defendant's objection; namely the defendant's prior conviction for

a misdemeanor." Judgment affirmed (114 F. 2d 982), certiorari denied (312 U.S. 681).

On August 13, 1941, the sum of $403.50 was realized from the sale of certain items of defendant's personal property, taken without warrant from his home in Chicago in August 1939, and sold by the United States Marshal at Danville, Illinois, to satisfy the improperly assessed judgment of $20,000.00. This amount together with $150.00 in cash was turned over to the Clerk of the Court (R. 18). On September 3, 1941, and again on September 27, 1941, the Clerk of the District Court forwarded by Trust Fund Voucher to the Division of Finance at Washington, D. C., an amount, including additional deposits on proceeds of sale, totaling $833.50. (R. 18).

On September 5, 1944, almost four years after the judgment of the Circuit Court of Appeals was entered, petitioner mistakenly filed in that Court a "Petition for Rehearing or for Leave to Proceed on Motion in the Trial Court for Resentence." In that document petitioner contended that only one offense was charged in the seven counts of the Indictment, and that the evidence was insufficient to support his conviction under Counts 1, 2 and 3. The Circuit Court of Appeals filed this petition.

On September 29, 1944, during the pendency of this proceeding in the Circuit Court of Appeals, the District Court, by whom the sentence was originally imposed, upon its own motion, amended the sentence by eliminating the assessment of fines on counts six and seven, but leaving in force the sentence of imprisonment, entering the order *nunc pro tunc* as of February 5, 1940, the date of the original judgment. This order was entered in the absence of petitioner and his counsel and without notice to them. On October 25, 1944, in a two judge, per curiam, opinion, the Circuit Court of Appeals denied the petition on its merits. This opinion was never officially reported.

Defendant then presented a petition for writ of certiorari. Counsel for the Government filed a memorandum in opposition. In this connection we respectfully call this Court's attention to the fact, that Government Counsel, which included the present Associate Justice, of the Supreme Court, Mr. Tom Clark, pointed out in their memorandum in opposition:

> The petition was filed approximately four years after the judgment of the Circuit Court of Appeals was entered. * * * In these circumstances, it is settled that the Circuit Court of Appeals lacked power to entertain the petitioner's application as a petition for rehearing, for "the case had passed beyond the control of the Court". (Citing cases) continuing: "To secure a judicial determination of the propriety of his sentences, petitioner may still file a motion for resentence in the District Court." Certiorari denied. 65 Sup. Ct. 683, rehearing denied 65 Sup. Ct. 910.

On May 2, 1944, when petitioner called the attention of the Judge of the Trial Court to the unlawful judgment, he replied by letter:

> "I am wholly without jurisdiction in your case. Your remedies lie with the parole authorities and with the executive authorities, the latter of whom alone can extend executive clemency."

Although later, by letter of May 16, 1947, he stated:

> "Any matter properly presented in open court will receive attention."

On September 24, 1948, petitioner filed a motion to vacate the void judgment of conviction under Section 2255, Title 28, U.S.C. The Government moved to dismiss said motion, urging that the District Court was bound by the unreported, per curiam decision of the *two-judge* Court of Appeals, a position which, at an earlier date, had been vigorously

repudiated by the Solicitor General in the Supreme Court (Mem. in Opposition, No. 704, O.T. 1944).

Petitioner, a layman, had been unable to retain counsel to represent him.

Petitioner contended in that motion that the Court should rule that this cause comes within the express prohibitions of the phrase in Section 2255, "that the remedy by motion is inadequate or ineffective to test the legality of his detention," so that he may be permitted to apply for a writ of habeas corpus, forthwith. Petitioner believes that due to the particular factual elements in this case, i.e., the imposition of the illegal fine, its partial collection in the amount of $833.50, the modification of the sentence in his absence, without further disposition of the unauthorized sanction, other than that the government still holds it, would seem to bring it expressly within the prohibition embraced in the words "inadequate or ineffective".

Specifically the questions submitted in that motion were:

1. Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts was it error, rendering invalid the judgment of conviction, for the Court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause? Particularly after timely objection was made?

2. (a) Whether the total absence of any evidence to support conviction as to Counts 1, 2 and 3 vitiated jurisdiction of the Court to impose sentence on such counts?

(b) Whether the Court having imposed sentences on Counts 1, 2 and 3 had authority to cumulate such sentences?

3. Whether it was a violation of the double jeopardy provisions of the Fifth Amendment for the Court to construe

Section 197 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 4 and 5 and of separate, consecutive sentences under Counts 6 and 7, and to impose such sentences?

4. Whether under the due process of law clause and the double jeopardy provision of the Fifth Amendment to the Constitution, a sentence imposing both imprisonment and fine, where the statute authorized imprisonment only, was void?

5. Where the Court having authority to impose imprisonment only imposed both imprisonment and fine, does the partial payment of the fine by distraint of personal property, violate the double jeopardy provisions and due process clause of the Fifth Amendment to the Constitution?

6. Whether the District Court, having sentenced the petitioner in a criminal proceeding to imprisonment and fine, under a statute permitting the imposition of imprisonment only, may amend the sentence in the absence of defendant and without notice to him, after partial payment of the fine by distraint of personal property?

7. Whether the form of the sentence is so vague and uncertain that any part thereof in excess of twenty-five (25) years is incapable of execution?

The statute under which this motion was drawn, provides, "the court shall grant a prompt hearing thereon." After being under submission for approximately eight months, the motion was denied on April 12, 1949, although the Trial Judge did obey the mandatory prohibitions of the Fifth Amendment, in part. Nine years and two months and seven days after the imposition of this illegal sentence, punished with the consequent mental anguish inherent in the knowledge that he was imprisoned under an invalid

judgment, petitioner solely through his own efforts succeeded in having the sentence conform to the law—but only in part.

The Honorable Judge Walter C. Lindley in *Waldon* v. *United States* (84 F. Supp. 449), in ruling on petitioner's motion, made tacit confirmation of petitioner's contention that for purposes of sentence Counts 1, 2 and 3 would support only one valid sentence. He further made tacit confirmation of the contention that Count four merged with Count six and Count five merged with Count seven. He made express confirmation of the contention that as a matter of law, petitioner could not properly be sentenced to consecutive sentences on Counts six and seven.

Judge Lindley found that at this late date, petitioner waived any right to object to the arbitrary elimination of women from the petit jury panel even where timely objection was made. Judge Lindley denied petitioner's contention that the imposition and collection by distraint of the illegal fines, in addition to a definite term of imprisonment, subjected the petitioner to double punishment, with this single bald statement, "Nor do I believe partial payment of a void fine entitles defendant to discharge from the valid part of his sentence."

Petitioner, while imprisoned in Leavenworth Penitentiary under this acknowledged invalid sentence, attempted to escape. On the morning of January 17, 1943 he tried to slip away unobserved, alone and without violence. He failed, was injured, received hospital care and was locked in segregation for fourteen months. On June 12, 1943 he forfeited 6108 days statutory and industrial good time. On August 26, 1943 he was on a plea of guilty, sentenced to one day in the county jail (R. 45). On March 19, 1944 he was transferred to Alcatraz with the approval of the Attorney General. Four separate and distinct and continuing pun-

ishments were imposed as a result of this abortive attempt to evade Federal custody.

The petitioner while serving the aforesaid sentence at the United States Penitentiary at Alcatraz, California, on October 20, 1949, filed a petition for a writ of habeas corpus (R. 2 to 14 incl.), alleging the restraint to be illegal because the only valid sentence which he can be required to serve under the aforesaid judgment and sentence is a sentence of ten years, five years under Count one and five years under Count four and that taking into consideration deductions to which he was entitled under the provisions of Sections 710, 713 and 744 H of Title 18 U. S. C. A., he is now, and was, at the time of the filing of his petition for writ of habeas corpus entitled to his release and discharge. Alleging also the restraint to be illegal because the judgment of conviction out of which it arose was void in that women qualified for jury service under State law were excluded from the petit jury. An Order to Show Cause issued on the petition (R. 21).

The respondent's return to the Order to Show Cause (R. 22) admitted all the facts alleged in the petition but prayed a denial thereof, because a motion made in the trial court pursuant to Section 2255, had been denied by the Trial Judge. The petitioner filed a traverse thereto (R. 51). Thereafter the Court below on November 23, 1949 denied the petition (R. 63), without delivering an opinion.

On appeal to the Court of Appeals for the Ninth Circuit the judgment was affirmed in a per curiam opinion consisting of a short paragraph of four lines.

Judge Lindley, the Trial Judge, rendered his decision on the basis of plain and unquestionable errors of law, which are demonstrably prejudicial and were neither cured by the Honorable Herbert W. Erskine in the District Court nor by the Court of Appeals below.

Such, then, is the state of the record as it now exists as we present this petition for writ of certiorari.

Note

There are in this ugly recital of a perpetuating revenge, two redeeming factors. The first of which is, that the present Associate Justice of the Supreme Court, Mr. Tom Clark, when Assistant Attorney General, vigorously protested the Court of Appeals decision as being without authority. Although it must be borne in mind that later, the Government, through its Assistant United States Attorney at Danville, Illinois, just as vigorously repudiated his superior's ruling.

In view of this fact the Government's present position should be viewed with restraint, perhaps caution.

The second factor is, that Judge Johnston, the then Warden of Alcatraz Penitentiary, deemed it essential to refer this unfortunate case to the Executive Branch. It was denied. Although a petitioner in an institution of this nature rarely uses space to praise a former Warden, here, then, though commendation is due, a few words must suffice. Always where there is respect for the law, men are found who resent injustice. Warden Johnston was perhaps such an one.

Such denial by the Executive Branch puts the problem squarely back where it properly belongs: in the lap of the Judiciary.

Questions Presented

1. A definite term of imprisonment and a $20,000 fine were imposed on petitioner, where the statutory penalty provided for imprisonment only. $833.50 of the illegally imposed fine was collected by distraint of personal property and covered into the United States Treasury. Several years later in the absence of petitioner and without notice to him,

the court vacated the illegally imposed fines without any reference to the money, which the government still retains. The question presented is whether in these circumstances the complete defect of such punishment, an invasion of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause and the double jeopardy provision of the Fifth Amendment?

2. Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts, was it error rendering invalid the judgment of conviction, for the Court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after timely objection was made?

3. Whether the admitted error in sentencing petitioner to consecutive terms of imprisonment for the same offense put petitioner twice in jeopardy, contrary to the Fifth Amendment?

Reasons Relied on for the Allowance of the Writ

A.

> "What question is of greater significance, or invokes the rights of more persons, than the right to the constitutional immunity from a second punishment for the same offense?" *Hans Nielsen, Petitioner*, 131 U. S. 176.

In a world fast resurrecting the ancient doctrine of might is right, this petitioner, of character far less than the least of those to whom this Court has always accorded the privilege of review, makes this, his last appeal to reason. It is presented with the feeling of deepest humility, tempered however by the realization that there are now no existing means by which this Court may write direction into the

Record to atone for the mental anguish inherent in the knowledge of imprisonment under an invalid judgment. That, this Court can not now do. It may render a judgment redressing the illegality and gross injustice resulting from the unlawful fines.

B. The decision of the Court of Appeals in deciding that the constitutional rights afforded to the defendant under the provisions of the Fifth Amendment (due process and double jeopardy) were not violated by the illegal imposition and unlawful retention of the fines, has decided this important question of Federal law in a way contrary to morality and conscience and directly in conflict with applicable decisions of this Court, particularly by the decision of this Court in *Ex parte Lange*, 85 U. S. 163.

C. The Order Amending Judgment dated September 29th, 1944, was so violative of the principles of natural justice that in merely filing it the court so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

D. The decision of the Court of Appeals in deciding that under the Fifth and Sixth Amendments to the Constitution and under the inherent power of this Court to direct the administration of justice in the Federal courts, it was not error, rendering invalid the judgment of conviction, for the court to exclude all women from the petit jury panel after timely objection was made, has decided this important question of Federal law in a manner which deprives a defendant of the impartial jury guarantee by the Constitution as such has been defined in the decisions of this Court, particularly by the decision of this Court in *Ballard* v. *United States*, 329 U. S. 187.

E. Although the above cited reasons may be sufficient and compelling, petitioner submits that review be accorded

under the inherent power of this Court to direct the administration of justice in the Federal courts. For the law seems clear and the remedy plain, it is simply that in a case which as thus far interpreted sanctions double punishment, the lower courts have not applied the established law. And this in a day, "when the federal judiciary attains the highest prestige, when federal procedural reform has set an example to be emulated everywhere." A sentence which should have been finally disposed of in the trial court over ten years ago, in conformity with the statute, still undermines the entire proceedings.

> "The elimination of excessive delay, expense and technicality in judicial proceedings is, in my opinion, the most important project facing the American bench and bar today," continuing "So long as judges are human, courts will make mistakes. But as long as courts are free to seek fundamental truths through the process of reason, though judges may falter momentarily, we need have no fear. Our precious democratic tradition will be maintained." Address of the Honorable Fred M. Vinson, Chief Justice of the United States, 70 S. Ct. November 15, 1949.

What question is of greater significance, or invokes the rights of more persons, than the right to have faith that there is still a law, basic and transcending, which must be observed, the moral law?

Prayer for Writ

WHEREFORE your petitioner respectfully prays that a writ of certiorari under Section 1254 (1) of Title 28 U. S. C. (Judicial Code and Judiciary) be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete tran-

script of the record and all proceedings in the cause numbered and entitled on its docket, No. 12465, John Walden, Appellant, vs. E. B. Swope, Warden, United States Penitentary, Alcatraz, California, Appellee, to the end that the judgment of said Court of Appeals be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

Respectfully submitted,

JOHN F. WALDON,
In propria persona.

Dated: September 29, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 401

JOHN WALDON,

Petitioner,

vs.

EDWIN B. SWOPE, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The "Findings of Fact and Conclusions of Law," of the trial court for the Eastern District of Illinois are reported in 84 F. Supp. 449. The District Court for the Northern District of California did not deliver an opinion. The order filed November 23, 1949 is printed at R. 63. The opinion of the Appellate Court, consisting of a paragraph of four lines was rendered and filed September 15, 1950 (R. 77).

Jurisdiction

The statute under which jurisdiction of this Honorable Court is invoked is Section 1254 (1) of Title 28 U. S. C.

(Judicial Code and Judiciary), which in its pertinent language provides:

> "Cases in courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

The date of the judgment of the Court of Appeals herein sought to be reviewed was September 15, 1950 (R. 77).

Statement of the Case

We have set forth in our petition a statement of the case under the heading, "Statement." For the sake of brevity, we will not repeat it here, but will adopt it as a statement of the case for the purposes of this brief.

Specification of Errors

1. The Court of Appeals erred in failing to hold that where a definite term of imprisonment and a $20,000 fine were imposed on petitioner, where the statutory penalty provided for imprisonment only, and $833.50 of the illegally imposed fine was collected by distraint of personal property and covered into the United States Treasury, and several years later in the absence of petitioner and without notice to him, the court vacated the illegally imposed fines without any reference to the money, which the government still retains, that in these circumstances, the complete defect of such punishment, an invasion of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause and the double jeopardy provision of the Fifth Amendment.

2. The Court of Appeals erred in failing to hold that under the Fifth and Sixth Amendments to the Constitution

and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts, it was error rendering invalid the judgment of conviction, for the Court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after timely objection was made.

3. The Court of Appeals erred in failing to hold that the admitted error in sentencing petitioner to consecutive terms of imprisonment for the same offense, put petitioner twice in jeopardy, contrary to the Fifth Amendment.

Summary of Argument

It will be argued by petitioner that where a Court having jurisdiction to impose imprisonment only, imposes both imprisonment and a fine, the partial payment of the fine, by distraint of personal property violates the double jeopardy provision and the due process clause of the Fifth Amendment to the Constitution. Petitioner will also argue, that even if the foregoing argument is invalid, the judgment rendered on each of Counts six and seven is void in that it was in excess of the authority conferred by the statute of the United States and against an express provision of the Constitution which bounds and limits all jurisdiction.

It will be further argued that the Court's attempt to amend its first judgment imposing both imprisonment and fine, by striking out the sentence to pay a fine, but leaving in force the sentence to imprisonment was violative of the principles of natural justice, in that the Government still retained the money taken by distraint and in that the amended order was issued in the absence of petitioner and without notice to him or his counsel.

It will be argued by petitioner that the Judge of the District Court and the Clerk thereof violated the laws of the State of Illinois and of the United States with reference to

the selection of the petit jury, by arbitrarily excluding women therefrom after timely objection was made. The Federal statute requires that jurors in the courts of the United States shall have the same qualifications as jurors of the highest court of law of the State at the time when they are summoned for service (28 U. S. C., Sec. 411). Consequently a Federal petit jury, drawn from a list of petit jurors from which women were excluded contrary to the requirements of Ill. Rev. Stats. 1939, C. 78, Secs. 1, 25, is not lawfully constituted. Not merely was the jury unlawfully constituted, but the illegality involved no mere technicality or irregularity, since it constituted a violation of the due process clause and a denial of the constitutional right of trial by an impartial jury.

Lastly, it will be argued that the consecutive sentences punish petitioner twice for the same offense. This was conceded by the trial Judge, but not expressly ruled because he believed such ruling, "would be no help to defendant." It was likewise conceded by government counsel in the Court below, for purposes of argument.

Petitioner a layman, believes it should be absolutely unnecessary to argue this last question before this Court, in view of the, "Findings of Fact" of the trial Judge. Moreover, in at least one instance in the Supreme Court, the Government conceded the correctness of petitioner's contention that Count four merges with Count six and Count five merges with Count seven. (*Hunter* v. *United States*, Memorandum in opposition, October Term, 1945, No. 360). In *Costner* v. *United States*, 139 F. 2d 429, Government Counsel which included the present Supreme Court Justice, Mr. Tom Clark, likewise conceded the validity of this contention, and the Court did so decide.

Argument

A DEFINITE TERM OF IMPRISONMENT AND A $20,000.00 FINE WERE IMPOSED ON PETITIONER, WHERE THE STATUTORY PENALTY PROVIDED FOR IMPRISONMENT ONLY. $833.50 OF THE ILLEGALLY IMPOSED FINE WAS COLLECTED BY DISTRAINT OF PERSONAL PROPERTY AND COVERED INTO THE UNITED STATES TREASURY. SEVERAL YEARS LATER IN THE ABSENCE OF PETITIONER AND WITHOUT NOTICE TO HIM, THE COURT VACATED THE ILLEGALLY IMPOSED FINES WITHOUT ANY REFERENCE TO THE MONEY, WHICH THE GOVERNMENT STILL RETAINS. THE COMPLETE DEFECT OF SUCH PUNISHMENT, AN INVASION OF PETITIONER'S RIGHT TO THE CONSTITUTIONAL IMMUNITY FROM A SECOND PUNISHMENT FOR THE SAME OFFENSE IS PRECLUDED BY THE DUE PROCESS OF LAW CLAUSE AND THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT.

Section 197 of the Criminal Code (18 U. S. C., 320) provides as follows:

> "Whoever shall assault any person having lawful charge, control, or custody, etc. shall be imprisoned twenty-five years."

Under the law, therefore, the authority of the court, was limited to imprisonment, it could not impose a fine.

The District Court sentenced petitioner, so far as is pertinent here, to:

> "Twenty-five years and ten thousand ($10,000.00) Dollar fine on the sixth count of said Indictment. Twenty-five years and Ten Thousand ($10,000.00) Dollar fine on the seventh count of said Indictment—sentence on Counts six and seven to run consecutively with each other but concurrently with sentence imposed on Counts 1, 2, 3, 4, and 5 of said Indictment, and that said defendant stand committed to said institution until payment of said fine, or until said defendant is otherwise discharged as provided by law." (R. 37).

The fine therefore was not merely collectible from the property of petitioner but the Marshal was directed to and did take him into custody until satisfaction of both aspects of the sentence.

On September 3, 1941, the sum of $280.00 applied as part payment of the fine was paid to the Post Office Department, Third Assistant Postmaster General, Division of Finance at Washington, D. C., by the Clerk of the District Court. On September 27, 1941, an additional $553.50, representing proceeds of sale under execution on personal property was forwarded to the same Department. These two items of receipt and disbursement total $833.50 (R. 18).

As shown above, the Court could not legally impose both punishments. We now contend that the judgment was void for lack of jurisdiction and that the partial payment of the fine by distraint of personal property violates the double jeopardy provision and the due process clause of the Fifth Amendment. See *Ex parte Lange*, 85 U. S. 163.

The case of *Ex parte Lange*, 18 Wall. 85 U. S. 163, 21 L. Ed. 872 is conclusive on the present question. In the *Lange* case the facts were as follows: Lange was convicted for an offense punishable by a fine or imprisonment and was sentenced to pay a fine and to imprisonment. On the same day Lange was committed to jail in execution of his sentence and on the next day the fine was paid to the clerk, who paid it into the Treasury. Thereafter, the sentence was vacated and Lange was sentenced to imprisonment only. On petition for a writ of habeas corpus the Supreme Court held that Lange should be released from custody. Ruling that the general power of the court over its own judgments, could not be used so as to violate the constitutional guaranty against double punishment, holding (p. 173) that this guaranty applied to all cases where a second

punishment is attempted to be inflicted for the same offense by a judicial sentence.

There, as here, the Court had imposed fine and imprisonment, when it lacked authority to do so: there the defendant paid the fine, here the fine was partially paid by distraint; there, the Court vacated its original order and brought the defendant before it for re-sentence; here, the Court did not even do that but simply entered its "Order Amending Judgment" in the absence of defendant and his counsel and without notice to them.

The *Lange* case differs from the present controversy in one respect only. In both cases the initial sentence was excessive. In the *Lange* case however, there was the legal satisfaction of an alternate penalty, while here is a question of multiple punishment. Yet *a fortiori*, the multiple punishment here was by distraint, and it is moreover of a different character than that provided by statute.

The Supreme Court in the course of an elaborate and comprehensive analysis of the "double jeopardy" provision and the "due process" clause, stated in the *Lange* case:

> "The judgment of the Courts in this class of cases extends to life, liberty, and property."
>
> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions on the application of this rule to cases in which the act charged was such as to come within the jurisdiction of more than one court there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

The factual situation in the instant case and the legal remedy were clearly delineated by the Supreme Court in the the *Lange* case when the Court said:

> "It is not necessary in this case to insist that other cases besides those involving life or limb are positively covered by the language of this amendment; or that when a party has had a fair trial before a competent court and jury, and had been convicted, that any excess of punishment deprives him of liberty or property without due process of law. On the other hand it would seem to be equally difficult to maintain, after what we have said of the inflexible rules of the common law against a person being twice punished for the same offense, that such punishment as is pronounced in this case is not a violation of that provision of the Constitution."

The above statement, precisely expressing the situation in the case at bar, is now the law upon which petitioner will most closely rely in his contention.

It is further stated in the *Lange* case:

> "It is very clearly the spirit of the instrument to prevent a second punishment under the judicial proceedings for the same crime, so far as the common law gave that protection."
>
> "For of what avail is the Constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having been once tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution."
>
> "The argument seems to us irresistible and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

We feel that in view of the language of the Supreme Court's opinion in the *Lange* case, this Court may conclude that the instant case is better grounded in point of law, as the following comparison will show:

Ex parte Lange	*United States* v. *Waldon*
1. Sentence amended 5 days later.	1. Sentence amended 4 years later.
2. Notice and opportunity to be heard. Lange and counsel were present.	2. No notice or opportunity to be heard.
3. $200.00 fine provided for Lange's release.	3. $833.50 still held by Government 10 years later.
4. Payment a matter of choice.	4. Payment a matter of compulsion.
5. Penalty of same character as that provided by statute.	5. Penalty of a different character.
6. Either penalty authorized by law.	6. Penalty unauthorized by law.
7. Common law precedents only.	7. Supreme Court authoritative precedents.

The principles enunciated in the *Lange* case, *supra*, were again sustained by the recent Supreme Court decision In re Bradley, 63 S. Ct., 470. In the *Bradley* case as in the *Lang* case the facts as to the imposition of the erroneous sentence were much the same, that is, the imposition of fine and imprisonment where the statutory authority was only to fine or imprison. The Court stated:

> "The court sentenced the petitioner to six months imprisonment, to pay a fine of $500.00 and to stand committed until he complied with the sentence. The sentence was erroneous: Ex parte Lang, 163, 176, 21 L. Ed. 872. Under 28 U.S.C.A. the sentence could only be a fine or imprisonment."

The case at bar, therefore, falls within the rule upon which the decisions in these cases are founded. It rests upon the

principle that no man shall be twice punished for the same offense.

The Government may again attempt to distinguish the *Lange* case, may again urge that the illegal imposition and unlawful retention of the fines in addition to the sentence of imprisonment does not constitute double jeopardy, may again seek some advantage by arguing that the precise ruling in that case merely held that an alternate penalty was satisfied. Quite plainly that is not the case.

We submit that the Government's view of the Lange ruling offers too easy a mode of evading the Constitutional prohibition. It overlooks the underlying basis for the Court's decision, the fundamental principle upon which the conclusion rested, that no one shall be twice punished for the same offense.

If it may be said, as the Government urged, that such narrow confines of the Lange holding weakens its authoritative force when applied to the instant case, it does not affect the persuasive and inherent force of the reasoning by which that view was sustained.

Nor does it affect the fact that the Supreme Court conceded in *Ex parte Lange* (p. 168) that if a case was presented where the abuse of the sentencing power was so extreme that it was in excess of that conferred by statute, it would violate the Fifth Amendment. The Court stated: "It is not necessary in this case to insist * * *, that any excess of punishment deprives him of liberty or property without due process of law. On the other hand it would seem equally difficult to maintain, * * * that such punishment as is pronounced in this case is not a violation of that provision (Fifth Amendment) of the Constitution."

It necessarily follows from the language of the opinion, that this Court on a proper factual showing would discharge a prisoner on a judgment rendered by a Court, imposing

excessive punishment, such as is imposed in the present case on each of Counts six and seven.

Now may the judgment be saved by rejecting that part of it which is unconstitutional and resorting to the general rule that a sentence is legal so far as it is within the provisions of law and jurisdiction of the court and only void as to the excess, when such excess is separable and may be dealt with, without disturbing the valid portion of the sentence. Such, was the view of the Trial Judge and in order to bolster up such convenient reasoning, the Court cited *United States* v. *Pridgeon*, 153 U. S. 48.

Such grossly unjust reasoning seeks to justify the complete defect by asserting that the illegal fines were merely excessive, and therefore presumably not punishment. Plainly that is not the case.

We submit that when a petitioner invokes the protection of the "double jeopardy" clause of the Fifth Amendment, as does the petitioner here, the test to be used in determining whether the case falls within the limitations of the words "void as to the excess," on the one hand, or of the phrase, "does not render the authorized portion of the sentence a nullity," on the other, is simply this. Where there is an excess of jurisdiction, resulting in a sentence beyond the power of the court to impose, such as a longer term, or greater punishment, or enforcing it in a different mode or place than that provided by law and such sentence is corrected to conform to the statutory requirements, *without prejudice to the petitioner*, the court's error is rendered harmless and that ends the matter. If not and the prisoner is still subjected to substantial injury, he is justified in seeking the constitutional protection.

Under the test stated it is indisputable that the *Pridgeon* case, *supra*, and the class of cases governed by it, fall under the first classification, harmless error.

It is equally indisputable that the case at bar falls under the latter classification, substantial injury.

Without attempting to review the numerous authorities, it suffices to say, we think it is apparent that they fall within one or the other of the categories just previously stated. The holding in, *In re Swan*, 150 U. S. 637, may be referred to in passing, since the opinion contains the broad statement that, "he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose. *Ex parte Lange*, 18 Wall 163; *Ex parte Parks*, 93 U. S. 18."

In the *Swan* case it was erroneously ordered by a Circuit Court in a contempt case that defendant be sentenced to imprisonment until restoration of certain goods unlawfully seized and upon such restoration then to three months imprisonment and until payment of costs.

The defendant contended that the court exceeded its power, in that the payment of costs was required, because the costs were in the nature of a fine, and therefore the sentence imposed both fine and imprisonment. The statute provides punishment "by fine or imprisonment". On habeas corpus this Court held that petitioner was not entitled to discharge and the language referred to above was used.

It is abundantly clear that inasmuch as the costs imposed in the case supra, were not paid, even if they were in the nature of a fine, the decision there is not controlling here. It is distinguishable.

It is also clear, that since support for the proposition laid down in the *Swan* case was drawn from Ex parte Lange, it necessarily follows that had the costs been paid, the conclusion would have been other than what it was.

The decisive distinction which both the Government and the Court below choose to ignore is the crucial fact that the

sentence in the instant case was implemented by the collection and present unlawful retention of the illegally imposed fines. $833.50 is still being held a decade later. The sanction of the fine is moreover of a different character than that provided by statute. Innumerable cases turn upon these distinctions.

This too, is the reason why the judgment may not be saved by rejecting that part of it which is constitutional. Punishment under the vicious part has been endured too long for it to be eliminated without destroying the whole judgment. It is no longer capable of separation. By weight of authority, such excess is separable only when the lawful part may be performed without performing the unlawful part. (39 C.J.S. Habeas Corpus, Sec. 26, page 499.)

Regardless what specious reasoning may be resorted to by Government Counsel to explain away the critical language of the *Lange* case, the plain unvarnished truth of it is, the illegal sanction of the fine on each of Counts six and seven is still double punishment precluded by the Fifth Amendment to the Constitution and violative of every judicial concept of natural justice.

The Order of September 29, 1944, purporting to amend the sentence imposed on February 5, 1940, was entered in the absence of petitioner and his counsel; without notice to petitioner or his counsel and while the petitioner was effectively prevented from being present by the previous sentence of the Court. It is our contention that although the sentence of February 5, 1940, was illegal and erroneous, this Order of September 29, 1944, is utterly void. It is a fundamental right of the defendant, under the due process of law provision of our Constitution, to be present at all stages of the proceedings, including the imposition of sentence; *Hopt* v. *Utah*, 110 U. S. 574, 579, 4 S. Ct. 202; *Price* v. *Zerbst*, 268 F. 2d 72.

The right to notice and a hearing is one of ancient origin and the ordinary safeguards were applicable. The petitioner had the usual rights of being present, of inspection of any memoranda offered as a basis for the correction, the right of cross-examination and the right to offer proof. *Downey* v. *United States,* 67 App. D. C. 192, 91 F. 2d 223, 230, 231, 233; *Hogan* v. *Hill,* 9 Fed. Supp. 333, 335.

Had petitioner been present with his counsel, he could have argued against this Order in that:

(a) The fine imposed by the sentence of February 5th, 1940, had been partially collected by distraint of personal property, such partial satisfaction of the fine, however illegally imposed is a criminal sanction and subjects the petitioner to double jeopardy and to a multiplicity of punishment in a single proceeding and therefore violates the Fifth Amendment.

(b) The Fifth Amendment stands as a jurisdictional bar to any valid, "Order Amending Judgment," as to Counts six and seven.

In *Windsor v. McVeigh,* 93 U. S. 274, 23 L. Ed. 914, it is said:

> "Wherever one is assailed in his person or his property, there may he defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

In the recently decided case of *In re Bradley,* 63 S. Ct. 470, where the factual situation was precisely similar to that of *Ex parte Lange, supra,* that is, imposition of fine

and imprisonment where the statutory authority was only to fine or imprison, the Court stated:

> "On September 28, 1942, the petitioner was committed to prison, on October 1st, his attorney paid the fine in cash to the clerk of the Court. Later in that day, the Court realizing that the sentence was erroneous, delivered to the clerk an order amending it by omitting any fine and retaining only the six months imprisonment."

In the instant case, as in the *Bradley case*, the Court amended the sentence by omitting the fine, but leaving in effect the sentence to imprisonment. Bradley was ordered released because of the satisfaction of an alternative penalty. Yet so basic is the right to be heard on a matter that may substantially prejudice petitioner's rights, that although Mr. Chief Justice Stone vigorously dissented from the majority opinion releasing Bradley, he still agreed, *as did the Government*, that the petitioner or his counsel had a right to be present when the sentence was amended. Mr. Chief Justice Stone stated:

> "I agree with the suggestion of the Government that the Court's second order resentencing petitioner could not rightly be entered without affording petitioner or his counsel an opportunity to be present and that the cause should, on that account, be remanded for further proceedings."

In *People* v. *Eller*, 153 N. E. 597, another case where the statute fixed the punishment for an offense at fine or imprisonment, although the relator, Lorenz was only fined one dollar, and the Court imposed both, the Supreme Court of Illinois there stated:

> "It may be that this construction allows Lorenz to select his own penalty, and to escape with a punishment entirely disproportionate to his crime; but if this be

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> "It may be that this construction allows Lorenz to select his own penalty, and to escape with a punishment entirely disproportionate to his crime; but if this be

> true, the blame therefore must rest with the criminal court and its state's attorney, who stood by in three courts and allowed the error of the court to go uncorrected * * *. The judge who imposed the sentence, and the state's attorney, must be presumed to have known of its legal effect, and intended that it should have that effect."

In the above, petitioner has set forth the principle which, if accepted by the Court would be sufficient in itself to establish his contention. Petitioner now presents an alternative principle, of equal sufficiency, for the consideration of this Court, namely:

The Sentence of February 5th, 1940, Imposing Imprisonment and Fine Was Entirely Void.

That a judgment imposing greater punishment than that authorized by law is void in its entirety for want of jurisdiction to impose it, is shown by decisions of this Court. *In re Mills*, 135 U. S. 263, 270, 10 S. Ct. 762, 764, 34 L. Ed. 107, the sentence imposed upon a petitioner by an inferior Federal Court was in excess of the authority conferred by the statutes of the United States. The Court said:

> "The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers. Ex parte Lange, 18 Wall, 163, 176; Ex parte Parker, 93 U. S. 18, 23; Ex parte Virginia, 100 U. S. 339, 343; Ex parte Rowland, 104 U. S. 604, 612; In re Coy, 127 U. S. 731, 738; Hans Nielson, Petitioner, 131 U. S. 176, 182."

In *DeBenque* v. *United States*, 85 F. 2d 202, the Court of Appeals for the District of Columbia, there stated, in footnote 4:

> "It is to be noted that in Ex parte Lange the Supreme Court treated the judgment first rendered

> as erroneous, not absolutely void, notwithstanding the fact that it did not strictly pursue the terms of the penalty statute. This is no longer the rule as has been pointed out in the discussion of In re Mills and In re Bonner supra."

A sentence of imprisonment imposed in a criminal case without warrant of law is in violation of the Constitution. *In re Hans Nielson*, 131 U. S. 176, where Mr. Justice Bradley said:

> "In the case of Lange and Snow there was a denial or invasion of a constitutional right. A party is entitled to a habeas corpus not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner, * * *. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

In *United States* v. *Bozza*, 155 F. 2d 592, decided in May 1946, the Court said:

> "However, it is well established that imposition of a sentence at variance with the statutory requirements is a 'void act'."

The Supreme Court, later in considering the same case, *Bozza* v. *United States*, 67 S. Ct. 645, stated:

> "It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal, Reynolds v. United States, 98 U. S. 145; Murphy v. Massachusetts, 177 U. S. 155; or in habeas corpus proceedings. In re Bonner, 157 U. S. 242."

The gross injustice of permitting the present judgment to remain in effect is immediately apparent when we consider what occurs in the present case if it is enforced. The law authorizes imprisonment but no fine. The Court

through inadvertence imposed both punishments when it could rightfully only imprison. By distraint of personal property, $833.50 was collected and is still retained. (It is a well known legal truth that a sale under such circumstances, brings but a small portion of the true value of the property sold.) The Court some four and one-half years later, amended the sentence by vacating the fines. If the present sentence is carried into effect the petitioner will not only be compelled to serve out his prison sentence, but will also be deprived of his property sold by distraint, and this is done because the first judgment was confessedly in excess of the authority of the Court. In the *Lange* case *supra*, the Court said (page 175):

> "Can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict: to do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

It is urged therefore that since petitioner, not only had been sentenced to a definite term of imprisonment, but has over a long period of years been deprived of the property seized by distraint; it constitutes a violation of the double jeopardy provision of the Fifth Amendment. *Ex parte Lange, In re Bradley, supra.*

2. THE CONSTITUTIONAL RIGHTS OF DEFENDANT WERE VIOLATED BY REASON OF DISCRIMINATION IN THE SELECTION OF THE JURY BY THE EXCLUSION OF WOMEN THEREFROM, AFTER TIMELY OBJECTION WAS MADE.

Before the jury was called, defendant by counsel, challenged the entire petit jury panel on the ground that there had been a discrimination in the selection of the jury by the exclusion of women therefrom (R. 15). The motion was overruled.

The defendant assigned as error on appeal, the error of the Court in overruling the challenge to the petit jury.

The error however, was neither briefed nor argued orally on appeal and was not decided by the Court. But it is now properly presented to this Court for decision. Of similar circumstances the Supreme Court of the United States recently stated in *Ballard et al.* v. *United States*, 67 S. Ct. 261, 329 U. S. 187:

> "We are met at the outset with the concession that women were not included in the panel of grand and petit jurors * * *. This issue was raised by a motion to quash the indictment and by a challenge to the array of the petit jurors because of intentional and systematic exclusion of women from the panel. Both motions were denied and their denial was assigned as error on appeal. The jury question has been in issue at each stage of the proceedings except the first time that the case was before us. At that time the point was not assigned or argued. * * * Under these circumstances we cannot say (and government does not suggest) that petitioners' have lost the right to urge the question here. Moreover, in this case, as in Reynolds v. United States, 98 U. S. 145, 168, 169, 25 L. Ed. 244, the error though not presented here on the first argument, appears on the face of the record before us. And see Sibbach v. Wilson Co., 312 U. S. 1, 16, 61 S. Ct. 422, 427, 85 L. Ed. 479."

The factual circumstances in the *Ballard* case and in the instant case are the same as regards this pertinent point.

In the *Ballard* case, before trial, the petitioners' challenged the petit jury panel because women were excluded. The motion was denied and its overruling was assigned as error, but the question was neither briefed nor argued on the original appeal to the Circuit Court of Appeals.

In the case at bar the situation was exactly the same.

If it is suggested that this point was abandoned because it was neither briefed nor argued in the Court of Appeals

for the Seventh Circuit, we submit that the identical situation prevailing in the *Ballard* case fully answers this contention. The Supreme Court there stated:

> "Under these circumstances we cannot say (and government does not suggest) that petitioners have lost the right to urge the question here."

Petitioner's objection to the array before the District Court was based upon the ground that the jury panel was composed exclusively of men and that women although they constitute a substantial part of the population of the Eastern District of Illinois and of the registered voters of that District were excluded from the box from which the list of petit jurors were drawn, in violation of the Federal statute.

The objection was based on the requirement of R. S., Sec. 800, 28 U. S. C. Section 411:

> "Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications * * * and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Under Illinois Law, at the time when these petit jurors were summoned, the Illinois Statutes specified the qualifications of the highest court of law of the State of Illinois as being, "the legal voters (or electors) of each sex." Ill. Rev. Stats., 1939, C. 78, Sec. 1, as amended by Senate Bill No. 88, and Sec. 25, as amended by Senate Bill No. 89, both effective July 1, 1939. (Ill. Const. Art. IV, Sec. 12).

Ill. Rev. Stats., 1939, C. 78:

Sec. 1, (Applicable to counties not having commissioners, See Sec. 25).

> "The county board of each county, shall, at or before the time of its meeting in September, in each year, or

at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than the one-tenth of the legal voters of each sex of each town or precinct of the county, giving the place of residence of each name on the list, to be known as the jury list."

Sec. 25. (Applicable to counties of over 250,000 population, having jury commissioners.)

"* * * The said commissioners upon entering upon the duties of their office, and every four years thereafter, shall prepare a list of all electors of each sex between the ages of 21 and 65 years, possessing the necessary legal qualifications for jury duty, to be known as the jury list."

It is therefore undisputed that women are qualified to act as jurors in the Federal Court by reason of their being qualified in the State Court where the trial was held, and the sole remaining question is whether or not they may be arbitrarily excluded notwithstanding their qualifications to act.

In *United States* v. *Roemig*, 52 Fed. Supp. 857, the District Court held, on the authority of the *Glasser* case, that the indictment should be quashed for discrimination against women jurors in the selection of a grand jury . The Judge states (at page 860):

"But the federal authorities cited, and the state court opinions examined by this Court, all antedate by several years the Supreme Court's opinion in Glasser *v.* United States, 315 U. S. 60, in which an attitude of direct disfavor was intimated toward the practice pursued in this instance. In the Glasser case the legal constitution of a federal grand jury in an Illinois district was challenged, on the ground that women were deliberately excluded from its membership. The challenge failed, not because it was necessarily ill founded, as a legal criticism, but rather because the Illinois legislation

> opening jury service to women had been enacted only recently before the assembling of the grand jury and under its own terms was not yet of universal application throughout the counties within the federal district."

The identical question was before the Supreme Court of the United States on certiorari to the Ninth Circuit Court of Appeals in the *Ballard* case, *supra*, in which Judge Denman of the Ninth Circuit Court of Appeals dissented on this ground, among others, in his dissenting opinion in that case.

The Supreme Court of the United States has also held in *Thiel* v. *Southern Pacific Co.*, 66 S. Ct. 984, that specialized selection of the jury vitiated the conviction. In this connection it was stated in the *Ballard* case:

> "In Thiel *v.* Southern Pacific Co., 66 S. Ct. 984, we were presented with a similar problem * * *. We held, that plaintiff's motion to strike the panel should have been granted. The gist of our ruling is contained in the following statement from the Thiel case opinion: 'The American tradition of trial by jury considered either in connection with either, criminal or civil proceeding necessarily contemplates an impartial jury drawn from a cross-cestion of the community * * *'."

In the *Thiel* case, it is stated:

> "The trial court should have granted petitioner's motion to strike the panel. That conclusion requires us to reverse the judgment below * * *. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class."

In *Edward F. Zap* v. *United States*, 67 S. Ct. 857, on a second petition for a rehearing and on a point on which certiorari was not granted the identical question was before the Supreme Court of the United States on Certiorari to the

Ninth Circuit Court of Appeals, in a per curiam decision the Court stated:

> "The judgment of the Circuit Court of Appeals is reversed and case is remanded to the District Court with directions to dismiss the indictment. Ballard *v.* United States, 67 S. Ct. 261."

In *Arthur L. Bell et al.* v. *United States*, 159 F. 2d 247, C.C.A. 9, the question of the exclusion of women from the grand jury panel was again presented. The Circuit Court of Appeals for the Ninth Circuit sitting en Banc, in a per curiam decision said:

> "Upon the authority of Ballard *v.* United States, 67 S. Ct., 261, the judgments appealed from in the above entitled case are reversed and the cause remanded to the District Court with instructions to dismiss the indictment."

That this question may be raised on habeas corpus proceedings would now appear to be incontestable, since jurisdiction on habeas corpus has been held to be coextensive with jurisdiction under Section 2255 and the question has already been presented to and decided on the merits by the Courts of Appeals in the Ninth, Eighth, Seventh and Fifth Circuits under Section 2255.

In this respect Judge Holtzoff of the District of Columbia in *United States* v. *Meyers*, 84 F. Supp. 766, there ruled:

> "It is the Court's view, therefore, that the extent of the Court's jurisdiction and authority under Section 2255 is coextensive with the jurisdiction of the Court passing upon an application for a writ of habeas corpus. That this construction of the statute is correct is shown by the decisions of the Court of Appeals for the Fourth Circuit."

Judge Holtzoff's statement and that of Judge Parker of the Fourth Circuit have a peculiar importance because sec-

tion 2255 was drafted by a committee appointed by the Judicial Conference of the United States, and Judge Parker was chairman of that committee and Judge Holtzoff a member.

In this connection, on motions to vacate, under section 2255, the question of the arbitrary elimination of women from the jury panels has already been decided on its merits by the Courts of Appeals in the following cases: *Wright* v. *United States,* (C.A. 8) 165 F. 2d 405; *King* v. *United States,* (C.A. 8) 165 F. 2d. 408; *York* v. *United States* (C.A. 8) 167 F. 2d 847; *Brown* v. *United States* (C.A. 8) 165 F. 2d. 409; *Williams* v. *United States* (C.A. 5) 168 F. 2d. 866; *Alger* v. *United States* (C.A. 7) 171 F. 2d. 667. It was also heard on the merits by the Court of Appeals for the Ninth Circuit in *Dean* v. *United States,* 169 F. 2d 71.

It is obvious therefore since jurisdiction under section 2255 has been held to be coextensive with jurisdiction of the Court passing on an application for a writ of habeas corpus, that this Court may properly decide this question.

The Government has heretofore answered the petitioner's claim that his constitutional rights were violated with the contention that such jury question may not be determined by application for a writ of habeas corpus.

The government urged in support of its case and Judge Erskine relied upon the decision in *Redman* v. *Squier,* 162 F. 2d. 195 where this Court of Appeals held that:

> "As far as the Ballard case, supra, is concerned it is not authority for the proposition that a grand jury panel can be attacked by habeas corpus proceedings. The objection should be made seasonably, by motion to quash, or some similar motion."

Little argument need now be devoted to the *Redman case* in view of the fact that such holding is not contrary to the position we take here and in view of the fact that the Court of Appeals for the Ninth Circuit later qualified their ruling

in *Rogers* v. *Squier,* 174 F. 2d. 348, decided May 4, 1949. If deemed essential, it may only be stated in passing that there are vital distinctions in the *Redman case* and the case at bar. The defendant in the *Redman case* had been denied leave to proceed *in forma pauperis* and the question therefore was not open to the petitioner and was not properly before the Court. The objection was to the composition of the grand jury panel and was raised for the first time on habeas corpus. In the case at bar, the objection is to the legal constitution of the petit jury panel, appears on the face of the record and was seasonably made before trial (R. 15).

Since the decision in *Rogers* v. *Squier,* 174 F. 2d. 348 was reached May 4, 1949, approximately two years after the holding in *Redman* v. *Squier,* 162 F. 2d. 195 (May 16, 1947) relied upon by the Government, petitioner believes that *Rogers* v. *Squier, supra,* correctly states the law as it is presently, in the Ninth Circuit.

The proposition for which the *Rogers case* stands is, that the right to raise this point on habeas corpus is dependent upon whether the defendant has waived the right by failure to interpose suitable objection in the trial court. From the language of the opinion it would seem obvious that had there been seasonable objection, the objection would have been sustained.

The Court of Appeals for the Ninth Circuit, speaking through Judge Healy there stated:

> "Petitioner concedes that in the course of the proceedings in which he was convicted no point was made of the exclusion of women and no challenge of any sort interposed to the composition or authority of either the grand or petit jury functioning in his case," continuing, "We have repeatedly held it is waived unless seasonable objection has been interposed in some appropriate way."

In all the reported cases to which petitioner's attention has been directed, such was the sole basis of the ruling. Not that the question was necessarily ill founded as a legal criticism, but simply that since it had not been timely raised, it could not be presented for the first time, whether by motion for new trial, by direct appeal, by motion to vacate or by habeas corpus.

In the instant case such objection was properly made (R. 15).

If women constitute a special group or class substantial in number then by their exclusion an impartial jury would not result. The exclusion then becomes unconstitutional not because women as such are excluded but because the jury has not been drawn in a manner which results in an impartial jury as thus defined. As Judge Denman points out in his dissenting opinion in *Ballard* v. *United States*, 152 F. 2d. 941:

> "It is a violation of the due process clause of the Fifth Amendment and impartial jury clause of the Sixth Amendment for the Clerk of the court and the jury commissioner, on the order of the court, to exclude from the jury lists one-half of all the persons—that is all women—* * *."

The Government has heretofore claimed that the petit jury was properly selected and has sought to justify such claim by the ruling in *Glasser* v. *United States*, 315 U. S. 60. The Government however does not bring itself within any of the recognized facts which the courts have held would support such ruling.

There are many factors which distinguish the instant case from the *Glasser case*. In the *Glasser case* the objection was to the constitution of the grand jury, in the instant case the objection is to the constitution of the petit jury. We submit that there is no legal comparison as to the injury

sustained. The exclusion of women from a grand jury does not have the same potentialities of prejudice as the exclusion of women from a petit jury panel. The opinion in *United States* v. *Glasser*, 116 F. 2d. 690, of the United States Court of Appeals for the Seventh Circuit, includes a discussion, from which it might be argued, that the judge delivering and the court approving, it would have been favorably disposed to a motion made in the present circumstances. They strongly intimated that had the challenge been to the composition of the petit jury, rather than to that of the grand jury, they would have sustained the objection when they stated:

> "Under such circumstances irregularities in the selection of jurymen are to be disregarded. (Citing cases.) The reason for this rule is that the grand jurors do not try the case but merely charge the accused."

There is still another important factor that distinguishes the instant case from the *Glasser case*. In the *Glasser case*, the county boards could wait until September 1, 1939, before including women on their jury list, yet the grand jury was summoned on August 25. A matter of 6 days *before* the law became universally mandatory. In the instant case the law was likewise universally mandatory as of September 1, 1939, yet the petit jury was not selected until February 5, 1940. A matter of 158 days *after* the law became mandatory.

In view of the language of the *Glasser* case it is scarcely credible that the 6 days referred to by the Supreme Court in their opinion as the "short time elapsing", before the mandatory effective date, could ever conceivably be meant to include 158 days after the mandatory date.

It is of course absurd to suggest that since the petit jury panel was chosen August 3, 1939, and the petitioner was

not tried until the following year, February 9, that it was not necessary to comply with the mandatory law as to the petit jury.

Petitioner's trial in February, of the following year was not even a part of the September, 1939 term of court. Important in this respect is the fact that the *placita* of the Clerk shows clearly that on the first Monday of December, 1939, there was a special term of court held (R. 15). Petitioner contends that the holding of this special term, terminated the September 1939 term of court. Title 28, United States Code, Section 139 provides:

> "A term of a district court continues for all purposes until terminated by order of final adjournment or by commencement of the next general or *special* term at the same place."

We think the position of the Trial Judge, as to a factual similarity between the *Glasser* case and the instant case, rendering the decision there controlling here, reflects a misapprehension as to the facts, as the following comparison will show:

Glasser v. *United States*	*Waldon* v. *United States*
1. Objection was to the Grand Jury.	1. Objection was to the Petit Jury.
2. Same term of court.	2. Different term of court.
3. Grand July summoned 6 days before law became mandatory.	3. Petit Jury selected 158 days *after* the law became mandatory.
4. Delay emphasized in Glasser v. United States, 116 F. 2d. 690 could not be avoided, since Congress had prohibited expediting the selection of grand jurors by (28 U. S. C. Sec. 419).	4. Congress provided for expediting the selection of petit jurors. (28 U. S. C. 417).

Glasser v. *United States*	*Waldon* v. *United States*
5. Case went to trial Feb. 5, 1940.	5. Case went to trial Feb. 5, 1940.
6. Six women served on Glasser's petit jury.	6. Denied the right to have women on petit jury.
7. No showing that women's names had yet appeared on state jury lists.	7. Showing that women had already served on Federal petit juries.

Moreover in the instant case the offense against the due process clause assumes greater significance when it is considered that although petitioner was denied the right to have women on his petit jury, women had already been called for jury duty in the federal district courts in Illinois in *United States* v. *Dressler,* 112 F. 2d. 972. And in the *Glasser* case, the 100 person venire summoned for the petit jury service, consisted of 47 females and 53 males, indicating that the clerk conformed to the requirements under Illinois law that the names of males and females be placed in the jury box without regard to sex. There were six women on Glasser's petit jury. The case went to trial on February 5th, 1940, the same day on which the petitioner in the instant case was tried and denied the right to have women jurors.

It seems plain that the action of the clerk in effectuating a systematic exclusion from the jury list of all females, constituted an administration of the law so arbitrary as to violate the petitioner's right to due process under the Fifth Amendment.

It seems equally plain that the action of the Judge in overruling the challenge to the array of the petit jury panel constituted a denial of the petitioner's right to a fair and impartial jury granted by the Constitution.

Petitioner contends that in a case of this kind the inquiry should be simply whether a defendant has been tried by a petit jury selected as he had the right under the law to

expect it to be selected. In *United States* v. *Roemig*, 52 F. 2d. 285, which referred to the grand jury rather than the petit jury, the Judge said:

> "That inquiry answered negatively, the indictment ought to fail, without requiring the doubtfully possible proof of concrete injury to the moving defendant.
>
> "The government of the United States, by which the rights of its citizens under the law should be jealously guarded, cannot itself be allowed the optional privilege of lawnessness in bringing those citizens before the bar of justice. It must not violate the law which it promulgates for the preservation of its own existence and the majesty and dignity; and then demand that its courts resolve in its favor a doubt whether its violation of the rights of the citizens has subjected him to practical injury."

From the foregoing authorities quoted petitioner sincerely believes that said judgment of conviction should be vacated and set aside.

3. THE ADMITTED ERROR IN SENTENCING PETITIONER TO CONSECUTIVE TERMS OF IMPRISONMENT FOR THE SAME OFFENSE, PUT PETITIONER TWICE IN JEOPARDY, CONTRARY TO THE FIFTH AMENDMENT.

Petitioner contends that for purpose of sentence Counts One, Two and Three recite the same offense.

Counts one, two and three (R. 25) were drawn under Section 317, Title 18 U. S. C. A., the relevant part of which provides:

> "Whoever shall steal, take or abstract * * * or destroy any such letter * * * or shall open, secrete, embezzle or destroy the same shall be fined not more than $2,000.00 or imprisoned not more than five (5) years or both."

The pertinent part of Count One charges:

> "* * * that John Frank Waldon * * * did destroy certain mail matter, to-wit; a certain letter

bearing three cents (3¢) in cancelled postage addressed to Mrs. Rose Holtzman * * *."

Counts two and three are identical to the allegation contained in Count One above, except the so-called destroyed letters in these counts were addressed to C. W. Wilson and Elmer Jean respectively.

The Trial Court conceded the contention that Counts Two and Three are identical to the offense in Count One, but did not expressly so rule. After citing Ex parte Lagomarsino, 13 F. Supp. 947, affirmed in *Johnston, Warden* v. *Lagomarisno*, 88 F. 2d. 86 (C. C. A. 9) and *Kerr* v. *Squier*, 151 F. 2d. 308, (C. A. 9) as authority, the Trial Judge stated in *Waldon* v. *United States*, 84 F. Supp. 449:

> "If I were to accept the authority of the above cited cases, I would probably have to hold that Counts 1, 2 and 3 stated only one offense. However, to do so would be of no help to defendant because these five year sentences were all made to run concurrently with the 25 year sentences on Counts 6 and 7."

It may be noted that the Government in the Courts below concede the validity of this contention, "solely for the purpose of argument."

Inasmuch as all of the evidence relative to these three counts was before the Honorable Judge Erskine in the District Court below, and the Court relied on Judge Lindley's "Findings of Fact", as to the evidence, it may be accepted as the law in the case, that these three counts recite but one offense. The Judge in the Court below, unlike Judge Lindley, is bound by the decisions of the Court of Appeals for the Ninth Circuit.

Since the question has been conclusively determined by the above cited cases, further argument is deemed unnecessary.

Petitioner contends that for purpose of sentence Count five cites the same offenses as Count four, and that Count four merged into Count six and Count five merged into Count seven.

It is admitted that the authority for the imposition of any sentence upon the petitioner under Counts four, five, six and seven flows from Section 197 of the Criminal Code, Title 18, Section 320, which provides:

> "Whoever shall assault any person having lawful charge * * * of any mail matter * * * with the intent to rob such mail matter * * * shall for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail * * * or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

Together with the verdict of the jury which was, and is, as follows:

> "We the Jury find the defendant, John Frank Waldon, guilty in manner and form as charged in the indictment in this case."

Count four, of the indictment, based upon Section 320, charges in substance, that petitioner, at a certain time and place, assaulted a railway postal clerk, with intent to rob him of the mail.

Count five, also based upon Section 320, charged that petitioner at the same time and place, assaulted a second railway postal clerk with the intent to rob him of the mail.

Count six, also based upon Section 320, charged that petitioner at the same time and place, in assaulting the first railway postal clerk, with intent to rob him of the mail, did wound him by the use of a dangerous weapon.

Count seven, also based upon Section 320, charged that petitoner at the same time and place, in assaulting the second railway postal clerk with the intent to rob him of the mail, did put his life in jeopardy by the use of a dangerous weapon.

Count five recites the same offense as Count four, (*Dimenza* v. *Johnston* 130 F. 2d. 465; rehearing denied 131 F. 2d. 47, (C. A. 9).

Count four merged with Count six and Count five merged with Count seven. The Trial Court stated in *Waldon* v. *United States, supra,* at page 455:

> "But the Court of Appeals for the Fourth and Ninth Circuits would probably hold contra." (that is for the petitioner). Continuing on page 456: "* * * on the contrary, other circuits in a habeas corpus proceeding, if they follow the decisions I have cited, might come to a different conclusion and release defendant."

The cases cited are indisputable and conclusive. They are: *Schwartz* v. *United States,* (9th Cir.), 160 F. 2d 718; *Colsen* v. *Johnston,* (D. C. Cal.), 35 F. Supp. 317; *Dimenza* v. *Johnston,* (9th Cir.), 130 F. 2d. 465; rehearing denied 131 F. 2d. 47; *Kerr* v. *Squier,* (9th Cir.), 151 F. 2d. 308; *Hunter* v. *United States* (6th Cir.), 149 F. 2d 711; *Costner* v. *United States,* (4th Cir.), 139 F. 2d. 429.

In *Costner* v. *United States, supra,* the Government conceded the correctness of the petitioner's contention insofar as is pertinent to the point here involved.

In the Supreme Court in the *Hunter* case, *supra,* the Government conceded the validity of the interpretation that Count four merged with Count six and Count five merged with Count seven. (Memorandum in opposition, October Term 1945, No. 360).

Since the cases cited are precisely in point, involving the same statute and determinative of the issues raised

on these counts no further argument will be made on behalf of the petitioner in the instant case.

Moreover, since petitioner has served a term of years in excess of any valid sentences on the first five counts, that is five years on Count one and five years on Count four,—in the extreme event Count four is held not to merge with Count six—how they may be variously construed, is perhaps not now of consequence.

Petitioner believes that due to the unfortunate circumstances of this case, that is the Government's reliance on policies of expediency rather than the preservation of legal and proper procedural standards, that he may properly ask that costs be awarded to him. He did so request in the District Court. He does so ask in this Court.

Conclusion

Sixty-nine years, later, in 1942, the time tested and time honored principles of the *Lange* case, which case had been based largely on historical and common law precedents, were again sustained under modern practice by the present Supreme Court in the *Bradley* case.

The effect of the opinion in the *Bradley* case is to indicate that the position of the Supreme Court has not changed since 1873 and that *Ex parte Lange* still states the position of the Court.

Petitioner submits therefore, that under the firmly established precedents—the overruling of which would, we believe destroy the traditional liberty of American justice of immunity from double punishment—appellant is entitled to be discharged from custody by writ of habeas corpus, although he has approximately four more years to serve on a sentence, which heretofore interpretated sanctions double punishment.

We submit, if the first contention is not sustained, that the verdict, judgment, and conviction and sentence under which the petitioner is committed are void because the trial Court lost jurisdiction over the proceeding by virtue of the exclusion of women qualified for jury service under State law, after timely objection was made.

WHEREFORE, for the reasons stated and the showing made, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

JOHN F. WALDON,
In Propria Persona.

Dated Alcatraz, California, September 29, 1950.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 401

JOHN WALDON, PETITIONER

v.

EDWIN B. SWOPE, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Ninth Circuit (R. 77) affirming an order of the District Court for the Northern District of California (R. 63) denying a petition for a writ of habeas corpus (R. 2-13). The case arose in the following manner:

1. On September 6, 1939, petitioner and two others were indicted in the United States District

Court for the Eastern District of Illinois in seven counts charging offenses against the postal service (R. 25-36). As indicated by the indictment, the charges grew out of an attempt by petitioner and two confederates to rob a United States mail car. The first three counts (R. 25-30) charged the defendants with destroying identified mail matter, in violation of Section 194 of the Criminal Code (18 U.S.C. [1940 ed.] 317).[1] Counts 4 and 5 (R. 30-33) charged separate assaults upon two custodians of the mail, Guy O'Hern and Earl Boothman, with intent to steal; count 6 (R. 33-34) charged the wounding of O'Hern with a dangerous weapon; and count 7 (R. 35-36) charged the jeopardizing of the life of Boothman by the use of a dangerous weapon, to wit, a revolver; all in violation of Section 197 of the Criminal Code (18 U.S.C. [1940 ed.] 320).[2]

In a pre-trial motion, petitioner, by his counsel challenged the petit jury panel on the ground that it contained no women (R. 15-16), and the challenge

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[1] Section 194 provided in pertinent part: "* * * whoever shall * * * destroy [any undelivered mail matter], shall be fined not more than $2,000 or imprisoned not more than five years, or both."

[2] Section 197 provided in pertinent part: "Whoever shall assault any person having lawful charge * * * of any mail matter * * *, with intent to rob, steal, or purloin such mail matter, * * * or shall rob any such person of such mail matter, * * * shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, * * * or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

was overruled (R. 16). The case then proceeded to trial, and petitioner was found guilty on all counts. On February 5, 1940, he was sentenced by District Judge Lindley to five years' imprisonment on each of counts 1, 2, 3, 4, and 5, the terms to be served consecutively, and to 25 years' imprisonment and a $10,000 fine on each of counts 6 and 7,[3] the latter two prison terms to be consecutive one to the other, but to run concurrently with the sentences imposed on the first five counts (R. 37-38), or a total prison sentence of 50 years.

On appeal to the Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed, *United States* v. *Waldon*, 114 F. 2d 982. On the appeal, petitioner being still represented by his trial counsel (cf. 114 F. 2d at 983 with R. 15), abandoned his challenge of the jury panel. Petitioner so concedes (Pet. 5-6). And the Court of Appeals stated in its opinion that: "[T]he only alleged error arises out of the admission of certain evidence * * *," although it also took occasion to observe that "All of the material allegations of each count of the indictment were abundantly supported by substantial evidence" (114 F. 2d at 983). On January 20, 1941, this Court denied a petition for a writ of certiorari, 312 U. S. 681.

2. During the month of September 1941, the

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[3] The imposition of the fines was unauthorized by the statute creating the offenses on which counts 6 and 7 were based (§ 197 of the Criminal Code, *supra*, fn. 2, p. 2). See *infra*, pp. 5, 8-9, 13.

clerk of the District Court for the Eastern District of Illinois applied a total of $883.50, which had been credited to petitioner's account in the clerk's "Trust Fund Collection Account," in part payment of the $20,000 in fines which that court had, erroneously (see fn. 3, *supra*, p. 3), imposed on petitioner on the sixth and seventh counts of the indictment (R. 18-19).

3. On September 5, 1944, petitioner filed in the Court of Appeals for the Seventh Circuit, the court which had affirmed his conviction four years earlier, a "Petition for Rehearing or for Leave to Proceed on Motion in the Trial Court for Resentence." In that document he "contended that only one offense was charged in the seven counts of the Indictment, and that the evidence was insufficient to support his conviction under Counts 1, 2 and 3" (R. 6-7). The Court of Appeals, on October 25, 1944, in an unreported *per curiam* opinion, denied the petition on the merits. It stated that the only important question sought to be raised was whether Section 197 of the Criminal Code (see fn. 2, *supra*, p. 2) authorized the imposition of consecutive sentences under counts 6 and 7. It held that it did. (See our memorandum in opposition to certiorari, No. 704, O.T. 1944, p. 3; see also *Waldon* v. *United States*, 84 F. Supp. 449, 450-451 (E.D. Ill.).) On February 26, 1945, this Court denied a petition for a writ of certiorari, 324 U.S. 847.

4. In the meantime, on September 29, 1944, District Judge Lindley, the judge who had presided at petitioner's trial, entered an order (R. 39-40) modifying the sentence which he had imposed on petitioner by eliminating the fines imposed on the sixth and seventh counts, the order reciting that the imposition of these fines had been inadvertent, being unauthorized by the statute defining the offenses charged in those counts, *i.e.*, Criminal Code, § 197, *supra*, p. 2, fn. 2. The order was entered *nunc pro tunc* as of February 5, 1940, the date of the original sentence (R. 40).[4]

5. Four years thereafter, on September 24, 1948, petitioner filed in the court of conviction, the District Court for the Eastern District of Illinois, a motion to set aside the judgment of conviction pursuant to § 2255 of revised Title 28 of the United States Code. While this motion is not contained in the present record, the nature of the contentions made in it (some of which challenged the validity of the judgment of conviction as a whole and others, the legality of portions of the sentence imposed)

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[4] The record does not reveal the circumstances under which Judge Lindley's attention was directed to the lack of statutory authority for the imposition of the fines. It does appear, however, that petitioner had been in correspondence with Judge Lindley in regard to his sentence shortly before the entry of the order vacating the fines (R. 8). The record also fails to disclose what steps, if any, have been taken toward restoring to petitioner the $883.50 utilized by the clerk of the trial court for partial payment of the fines (see *supra*, pp. 3-4). According to the petition for certiorari, "the government still holds it" (Pet. 8).

appears from the allegations of the habeas corpus petition which gave rise to the present proceeding (see R. 8-11), and also from the opinion of the court (Judge Lindley) disposing of the motion, *Waldon* v. *United States*, 84 F. Supp. 449. These contentions, so far as now relevant, may be summarized as follows:

(1) The conviction and sentence were invalid *in toto* because women were excluded from the jury panel from which the petit jury which tried petitioner was drawn (R. 9; 84 F. Supp. at 451);[5]

(2) The first three counts of the indictment (see p. 2, *supra*) charged but one offense; consequently, the imposition of consecutive sentences on those counts was unwarranted (R. 9; 84 F. Supp. at 451-452);

(3) The offense charged in count 4 (assaulting the mail-custodian O'Hern) "merged" with the offense charged in count 6 (wounding O'Hern); in like manner, the offense charged in count 5 (assaulting Boothman) "merged" with the offense charged in count 7 (jeopardizing the life of Boothman with a dangerous weapon); moreover, counts 6 and 7 themselves charged but a single offense.

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[5] It will be recalled that this was the contention, or one of the contentions, which petitioner, by his counsel, abandoned on his original appeal from the judgment of conviction (see p. 3, *supra*). It should be noted, too, that this was not among the contentions which petitioner sought to raise in the 1944 proceeding which he instituted in the Court of Appeals which had affirmed his conviction four years earlier (see p. 4, *supra*).

Consequently, count 4 could support no sentence distinct from that imposed under count 6; count 5 could support no sentence distinct from that imposed under count 7; and the imposition of consecutive 25-year sentences on counts 6 and 7 was unauthorized, *i.e.*, those two counts do not support more than a total of 25 years' imprisonment (R. 10; 84 F. Supp. at 452-455);[6]

(4) The erroneous imposition of fines on the sixth and seventh counts (see fn. 3, *supra*, p. 3) rendered the sentences on those counts void in their entirety. In the alternative, the imposition of fines on those counts, though unauthorized by the statute defining the offenses charged therein, exhausted the court's sentencing powers with respect to those counts, with the consequence that the prison sentences imposed on those counts were invalid. This conclusion was fortified, it was argued, by the fact that the fines imposed on counts 6 and 7 had been paid in part (see p. 4, *supra*), and, it was further argued, the order of September 29, 1944, setting aside the fines *nunc pro tunc* as of the original date

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[6] It should be noted that, since the consecutive 5-year sentences on counts 4 and 5 were made to run concurrently with the consecutive 25-year sentences on counts 6 and 7 (see p. 3, *supra*), the question of whether the count-4 and count-5 offenses "merged," respectively, with the count-6 and count-7 offenses did not, as pointed out by Judge Lindley (84 F. Supp. at 454), require decision. "The important question," as Judge Lindley observed (*ibid.*), was "whether separate consecutive sentences were properly imposed on Counts 6 and 7." This question, as we point out, *infra*, was resolved by Judge Lindley in petitioner's favor.

of sentence (*supra*, p. 5), was void because entered in petitioner's absence and without notice to him. (R. 10; 84 F. Supp. at 455.)

On May 12, 1949, the District Court (Judge Lindley), in an exhaustive opinion (84 F. Supp. 449), granted in part and denied in part the relief sought by the foregoing motion. With respect to the challenge of the composition of the petit jury, he ruled both that the contention was unsound on its merits and that it had, in any event, long since been waived by petitioner in consequence of his abandonment of the point on his original appeal (84 F. Supp. at 451). With respect to the contention that counts 1, 2, and 3 charged but a single offense, so that the cumulation of the 5-year sentences on those counts was unwarranted, he ruled that, while the question was not free of doubt, it was unnecessary to decide it in this case because, even if those counts did charge but one offense, that fact "would be of no aid to [petitioner] because these five year sentences were all made to run concurrently with the 25 year sentences on Counts 6 and 7" (84 F. Supp. at 451-452). With respect to the various contentions based upon the erroneously-imposed and subsequently-vacated fines on counts 6 and 7, Judge Lindley held that his error in imposing these fines did not vitiate the valid prison sentences on those counts; that the partial payment of the void fines did not entitle petitioner "to discharge from the valid part of his sentence"; and

that the absence of petitioner at the time the void fines were vacated was immaterial, since "[t]here is no requirement that a defendant be present when the court merely strikes a void part of the judgment" (84 F. Supp. at 455). Finally, with respect to the contention that the imposition of two consecutive 25-year sentences on counts 6 and 7 was unauthorized because those counts, allegedly, charged but a single offense,[7] Judge Lindley, having reached the conclusion, following a review of pertinent authorities, that the question was not free of doubt (84 F. Supp. at 454-455, 456), decided to "adopt that construction which is most favorable to [petitioner]"; *i.e.*, he ruled that those counts did charge but one offense, as claimed, and accordingly modified the sentence by directing that the two 25-year sentences imposed on those counts "run concurrently with each other and concurrently with the [consecutive 5-year] sentences imposed on Counts 1, 2, 3, 4, and 5, so that the total sentence of defendant will be 25 years in all" (84 F. Supp. at 456).[8]

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[7] For the reasons already explained (see fn. 6, *supra*, p. 7), there was no need for Judge Lindley to dispose of petitioner's related contention, *viz.*, that the offenses charged in counts 4 and 5 "merged" with the offenses charged in counts 6 and 7, respectively.

[8] Judge Lindley pointed out in his opinion that "the Court of Appeals from this circuit has already decided the issue [of whether counts 6 and 7 charged separate offenses and so would support consecutive sentences] adversely to defendant" (84 F. Supp. at 454; see p. 4, *supra*, where we made reference to the Court of Appeals' earlier decision on this point), so that "[u]ndoubtedly under the law in this circuit I would be justified in denying the motion entirely" (84 F. Supp. at

6. Petitioner took no appeal from the foregoing decision of Judge Lindley. Instead, on October 20, 1949 (R. 14), he brought the present habeas corpus proceeding in the District Court for the Northern District of California. It is clear from the petition for habeas corpus (R. 2-13; see, particularly, R. 11-12), and from petitioner's traverse (R. 51-62) to the Government's return (R. 22-50) to the show-cause order (R. 21-22), that the sole purpose of the habeas corpus proceeding was to relitigate the issues involved in the § 2255 proceeding before Judge Lindley in so far as they were resolved against petitioner in that proceeding. On November 23, 1949, the District Court denied the petition "upon the authority of," *inter alia*, Judge Lindley's decision in the § 2255 proceeding (R. 63). The Court of Appeals for the Ninth Circuit affirmed the order of denial (R. 77) in a *per curiam* opinion (R. 76) which merely cited the earlier decisions involving petitioner, including Judge Lindley's decision in the § 2255 proceeding. The petition for a writ of certiorari seeks review of the Ninth Circuit's judgment of affirmance.

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456). However, since the law in other circuits seemed to Judge Lindley to be contrary to the earlier Seventh Circuit decision in this case, with the result that "other circuits in a habeas corpus proceeding * * * might come to a different conclusion," he decided to "terminate further litigation and settle once and for all the defendant's contentions" by resolving the issue posed in petitioner's favor (*ibid.*).

ARGUMENT

It is clear that the petition for certiorari presents no question requiring further review by this Court. 28 U.S.C. 2255 provides:

> A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Petitioner has already filed a motion pursuant to the foregoing section, asking the court in which

he was convicted to set aside, in whole or in part, the judgment of conviction and the sentence imposed upon him. Following painstaking consideration of all the contentions advanced by petitioner, Judge Lindley, the judge who presided at his trial and imposed sentence, granted in part and denied in part the relief sought. To the extent that Judge Lindley's order granted relief, his decision was highly favorable to petitioner, and was indeed more favorable than petitioner had any right to expect. His order modifying the 25-year sentences on counts 6 and 7 by directing that they run concurrently, rather than consecutively, had the effect of cutting in half the time which petitioner is required to serve. This action was taken, moreover, after the Court of Appeals having appellate jurisdiction over Judge Lindley's court had refused the very relief which Judge Lindley accorded, pursuant to its holding that the sentences on those counts had properly been directed to run consecutively. To the extent that Judge Lindley's order denied relief, it was plainly correct, as examination of his opinion discloses. Petitioner made no attempt to appeal from Judge Lindley's decision in so far as it was adverse to him. Instead, he sought to relitigate the same issues in the instant habeas corpus action. This he may not do, unless he makes some showing "that the remedy by motion is inadequate or ineffective to test the legality of his detention" (§2255, *supra*, last paragraph). See *Barrett* v. *Hunter*, 180 F. 2d 510 (C.A. 10), certiorari denied,

December 4, 1950, No. 3 Misc. Petitioner has made no such showing, and it is clear from the nature of his various contentions, all of which present naked issues of law, that any attempt to do so would have been unsuccessful. For these reasons, the petition for a writ of certiorari should be denied.[9]

Respectfully submitted.

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DECEMBER 1950.

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[9] Petitioner, of course, is entitled to recover, if he has not already done so, the $833.50 part-payment of the $20,000 in fines erroneously imposed under counts 6 and 7 of the indictment, which fines, as we have pointed out, were eliminated by Judge Lindley's 1944 order (*supra*, p. 5). But the matter of the recovery of this money can obviously not be raised in a habeas corpus proceeding.

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